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FEDERAL COMMUNICATIONS COMMISSION  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )

Implementation of Section 25 )  
of the Cable Television Consumer )  
Protection and Competition Act )  
of 1992 )

Direct Broadcast Satellite )  
Public Service Obligations )

MM Docket No. 93-25

To: The Commission

COMMENTS OF  
ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS  
and CORPORATION FOR PUBLIC BROADCASTING

Marilyn Mohrman-Gillis, Esq.  
Association of America's  
Public Television Stations  
1350 Connecticut Avenue, N.W.  
Suite 200  
Washington, D.C. 20036

Thomas E. Harvey, Esq.  
Senior Vice-President and General  
Counsel  
Corporation For Public Broadcasting  
901 E Street, N.W.  
Washington, D.C. 20004

Of Counsel:

Mr. Edward Coltman  
Pamela J. Brown, Esq.  
Corporation For Public Broadcasting  
901 E Street, N.W.  
Washington, D.C. 20004

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**SUMMARY**

Section 25(b) of the Cable Television Consumer Protection









and Competition Act of 1992 ("the Act") provides forward into the

[REDACTED]

imposes conditions on those leasing DBS capacity. it should be

the extent that they interfere with the rights afforded non-commercial users, should not be grandfathered. Grandfathering such contracts would unduly postpone achieving Congress' objective in enacting Section 25, by delaying noncommercial programming suppliers access to the DBS capacity.

Sixth, the Commission should require, as a part of the satellite licensee's obligation to make capacity available to noncommercial users, that (i) regular noncommercial programming is available to subscribers from the DBS operator as part of the lowest-price "tier", (ii) special-event noncommercial programming is available to subscribers at the lowest per-program-hour rate charged for any pay-per-programming, and (iii) the subscriber is required to purchase no equipment other than the lowest priced basic receive equipment to obtain the noncommercial programming.



Ninth, the Commission should permit the DBS provider to use unused noncommercial capacity until the noncommercial programming supplier is ready to use the capacity. APTS and CPB also suggest that noncommercial users give the DBS provider at least ten days notice of their intention to use the reserved channel capacity.

Tenth, in light of the clear statutory language and reinforcing legislative history, the Commission should define "direct costs" narrowly to minimize the cost to noncommercial program suppliers. APTS and CPB urge it to limit direct costs to the allocable portion of the following cost items: (a) encoding, compression and uplinking, (b) authorizing user to access the satellite, (c) producing, publishing and distributing program guides, and (d) direct taxes occasioned by the sale or lease of capacity to the noncommercial user

While APTS and CPB believe that the Commission has done an excellent job of defining many of the issues raised by Section 25(b), they also believe that there are a number of other complex and difficult administrative and operational questions concerning Section 25(b) that must be resolved if the benefits Congress envisioned are to be realized. They therefore urge the Commission to create an Advisory Committee consisting of members of the public broadcasting community, DBS satellite entrepreneurs, educational organizations and other interested parties to study outstanding DBS issues. These include such questions as the resolution of conflicting demands for access, the funding of the programming to be distributed under Section

25(b), and feasibility of imposing local programming obligations on DBS providers.

Finally, APTS and CPB submit that, by its terms, Section 25 does not impose that the political broadcasting requirements on noncommercial users.

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## **I. Introduction**

Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 ("the Act") requires the Commission to adopt rules (a) defining the public interest obligations of providers of direct broadcast satellite ("DBS") service and (b) reserving capacity for noncommercial educational programming at reasonable rates. That Section also requires the Commission to examine the potential for DBS to fulfill the Commission's goal of service to local communities. These comments will focus primarily on the provisions of Section 25(b) requiring the reservation of capacity for noncommercial educational and informational programming. In that regard, APTS and CPB recommend that the Commission convene an Advisory Committee to address a number of technical and operational issues that must be resolved if the goals of Section 25(b) are to be realized. Finally, these comments will touch briefly on whether the political broadcast rules which the Commission has proposed to adopt should apply to noncommercial educational users of DBS capacity and on the localism issue.

II. Section 25(b) Implements Congress' Long-Standing  
Commitment to Assuring the Availability of  
Noncommercial Educational Programming Through All

Congress has also recognized that the distribution of this programming should not be limited to the broadcast medium, but that it should be available through other distribution technologies. Thus, as early as 1967, Congress decreed that:

it is in the public interest to encourage the growth and development of nonbroadcast technologies for the delivery of public telecommunications services.<sup>4/</sup>

In 1978, Congress again noted that public television should "make the maximum use practicable" of new technologies.<sup>5/</sup> Similarly, in 1988, when Congress funded public broadcasting's new satellite interconnection system, the House Report stated:

it is critical that the public broadcasting system be able to take advantage of technologies such as advanced television technologies, including HDTV, interactive video and digital data distribution.<sup>6/</sup>

Last year, when Congress authorized additional funds for public broadcasting, it again found that:

it is in the public interest for the Federal Government to insure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies.<sup>7/</sup>

The House Report similarly provided that the legislation:

strongly endorses a policy of broad access to the essential public services offered by telecommunications, regardless of the technology used to deliver those services, in order to advance the compelling governmental interest in increasing

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<sup>4/</sup> 47 U.S.C. § 396(a)(2).

<sup>5/</sup> See, e.g., S. Rep. No. 96-858, 95th Cong., 2d Sess 6 (1978).

<sup>6/</sup> H.R. Rep. No. 825, 100th Cong., 2d Sess. 14 (1988).

<sup>7/</sup> P.L. No. 102-356, 106 Stat. 949 (Aug. 26, 1992) (emphasis added).

the amount of educational, informational, and public interest programming available to the nation's citizens.<sup>8/</sup>

Section 25(b) applies this congressional policy to DBS, much as the "must carry" provisions of that Act<sup>9/</sup> applies it to cable.

Given this clear Congressional policy, APTS and CPB submit that the regulations the Commission adopts must assure that public broadcasters and other qualified educational institutions are (1) given access to DBS satellite facilities at reasonable rates and (2) assured that the capacity made available is in amounts and at times that will permit them to offer meaningful program services to the audiences for which those services are intended. These comments set forth proposals that APTS and CPB believe will assure those objectives. APTS and CPB stress, however, that whatever regulations the Commission ultimately adopts, they must be carefully crafted to insure that the obligations imposed by Section 25 are not evaded.

### **III. The Satellite Licensee Should Be Ultimately Responsible for Assuring Compliance with Section 25**

The Commission solicits comment on which entity should be held ultimately responsible for fulfilling the obligations of Section 25. Notice at ¶¶ 9-16. As the Commission recognizes, the Act is not clear on this point. Section 25(b)(1) provides that the obligations apply to "a provider of direct broadcast satellite service," but that term, as defined in Section

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<sup>8/</sup> H.R. Rep. No. 363, 102d Cong., 1st Sess. 18 (1991).

<sup>9/</sup> See Section 5 of the Act.

25(b)(5)(A), could apply to a number of potential entities, including the satellite licensee, the video programmer, other program suppliers and distributors, or other third parties, such as entities that lease capacity on a wholesale basis and resell it to individual programmers. Notice at ¶¶ 9-11, 16-17. APTS and CPB urge the Commission to make the licensee, in the case of both Part 100 and Part 25 satellites, ultimately responsible for assuring that DBS capacity is made available for noncommercial program services.<sup>10/</sup>

**A. Part 100 DBS Satellites**

With respect to licensees under Part 100, APTS and CPB support the Commission's tentative conclusion that the satellite licensees under Part 100 are the entities that must bear the ultimate responsibility to assure that capacity is made available for noncommercial educational use. See Notice at ¶ 8. That conclusion complies with the explicit language of Section 25(b), which defines a DBS provider as "a licensee for a Ku-band satellite system under part 100 of title 47 of the Code of Federal Regulations."

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<sup>10/</sup> APTS and CPB assume that the licensee is not a shell, but an operating entity which effectively controls the satellite. However, given the variety of business arrangements, which appear to be developing in the DBS industry, it is conceivable that the licensee and the entity controlling the use of the satellite could be distinct legal entities. In those circumstances, the Commission should look beyond the party with de jure control to determine which party is exercising de facto control over the satellite. See Mutual Radio of Chicago, Inc., 98 F.C.C.2d 330, 55 RR 2d 1577 (1984); George E. Cameron, Jr., Communications (KROQ), 91 F.C.C.2d 870, 52 RR 2d 455 (1972).

**B. Part 25 Satellites Used for DBS**

While the Act is not the paragon of clarity, APTS and CPB submit that the best interpretation of Section 25, when read as a whole, is that the Part 25 satellite licensee should ultimately be responsible for ensuring compliance with Section 25. This reading also comports most closely with the manner in which the Commission has historically exercised its regulatory powers and is the easiest to implement.

Under the terms of Section 25(b)(1), the obligation to make capacity available for educational use is a condition of "an authorization." Since the Commission only authorizes licensees -- not the lessors of satellite capacity or DBS providers -- Section 25(b)(1) clearly looks to the licensee as the entity responsible for assuring compliance. While Section 25(b)(5)(ii) is broader and arguably imposes the obligation on entities other than the licensee,<sup>11/</sup> that provision can also be read as setting forth the events which trigger the Section 25(b) obligation on the Part 25 satellite licensee. Under this interpretation, the lease, sale or use of capacity on a Part 25 satellite by a DBS "distributor who controls a minimum number of channels" triggers the licensee's obligation under Section 25(b).

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<sup>11/</sup> Specifically, Section 25(b)(5)(ii) defines a "provider of DBS service" as a "distributor who controls a minimum number of channels . . . using a Ku-band fixed service satellite system for the provision of video programming directly to the home and licensed under part 25" of the Commission's rules.

APTS and CPB submit that this reading of Section 25(b)(5)(ii) is preferable because it will best implement Congress' intent to assure that capacity is made available for educational programming by making it clear where the Section 25(b) responsibility lies. The House version of the Act operated clearly in this manner, see, H.R. 4850, § 18(a)(4), making the obligation to provide capacity for educational use a condition of the license.<sup>12/</sup> There is nothing in the Conference Report that indicates that Congress intended to alter that approach. To the contrary, the Conference Report indicates that the Act was adopted from the House version, with modifications not relevant here. H. Rep. No. 102-862, 102d Cong. 2d Sess. 124 (1992).

Further, this interpretation comports with the Commission's general regulatory approach. As a general matter, the Commission exercises its regulatory powers by regulating its licensees and others who require a Commission authorization. For example, the payola provisions of the Communications Act impose the disclosure requirements on the licensee, even where the payment is made to third parties. 47 U.S.C. §§ 317 & 508.

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<sup>12/</sup> The House version of the Act clearly provided that the obligation to make capacity available was a condition of the satellite authorization where the satellite was used for DBS. See H.R. 4850, §18(a)(4). Under that Bill, however, the actual requirement to make capacity available was imposed on the entity providing the DBS service. See H. Rep. No. 102-628, 102d Cong., 2d Sess. 124 (1992). The interpretation advanced by APTS and CPB operates in a similar manner but affords greater flexibility in implementing the Section 25(b) requirement.

Enforcing Section 25(b) in this manner is also easier to administer than one that entails regulation of program distributors, transponder lessees, etc. First, the Commission would be employing the same regulatory regime for both Part 100 and Part 25 DBS satellites. Second, the Commission has detailed information as to the licensee of every satellite, its ownership and governance. Unlike DBS program distributors or transponder lessees, the Commission can easily keep track of the licensees to insure that the Section 25 obligations are fulfilled.

Third, the Commission has a range of established regulatory mechanisms to insure that licensees comply with Section 25(b). In contrast, its enforcement powers with respect to non-licensees are limited to forfeitures and cease and desist orders, 47 U.S.C. § 312(b) and § 503(b)(2)(C), neither of which is as effective as the Commission's licensing powers. Finally, by looking to the licensee to assure compliance, the Commission will not have to extend its jurisdiction over entities, such as program suppliers and lessees of transponders, that are not dependent on the Commission for their operating authority. The scope of the Commission's power to regulate these entities is not as well settled as it is with respect to its licensees, and efforts to assert jurisdiction could involve the Commission in extensive litigation over its regulatory authority and the limitations imposed on that authority by the First Amendment.

**C. The Licensee Should Be Given Discretion to Determine How to Assure Compliance with Section 25, But Should Be Required to File Quarterly Reports with the FCC**

While APTS and CPB believe that the satellite licensee should be required to assure compliance with Section 25, the manner in which the licensee fulfills that obligation should be left to the licensee. It could make the channel capacity directly available itself or it could impose appropriate conditions on those leasing capacity for DBS.<sup>13/</sup> Giving the licensee that discretion will allow it to decide how best to accommodate the Section 25(b) obligation within its overall operational and business plans. The key is that the capacity be made available and that there are adequate enforcement mechanisms in place to assure compliance.

In order for the Commission and interested educational programming organizations to know how these satellites are being

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<sup>13/</sup> The Commission has requested comment on the appropriate definition of a "distributor" for the purposes of Section 25(b), Notice at ¶¶ 10-11, and suggests that the term includes "parties that are engaged in various activities related to the delivery of video entertainment programming such as program packaging, program delivery, subscription billing and customer service." Id. at ¶ 10. APTS and CPB generally support that view, but submit that the term should not be limited to those delivering entertainment or video programming. DBS distributors could provide a variety of other program services, including technical training programs, home shopping services, etc. Some of them could also offer radio program services or computer programs or other forms of information. Moreover, the term should also not be limited to entities which distribute to the home, as is the case in the Satellite Home Viewer Act. DBS services may be offered to businesses, professional offices, or other locations outside the home. Accordingly, APTS and CPB submit that the Commission should define the term expansively to include these various types of potential services that might be offered by DBS.

used and what capacity is available for noncommercial educational use, the Commission should require the licensees of both Part 100 and Part 25 satellites to file reports quarterly concerning DBS use. These reports should contain information concerning (a) the number of transponders devoted to DBS use; (b) the channelization/compression being employed on each transponder; (c) the number of video and audio programs being distributed on each transponder; (d) the data services being offered or which could be offered on each transponder;<sup>14/</sup> and (e) a description of how the licensee is fulfilling the requirements of Section 25 as implemented by the Commission's rules.

With respect to the last item, the licensee should identify the entity or entities to whom noncommercial capacity is being provided, the conditions under which it is being provided, and the rates, if any, being charged. It should also provide information as to the entities that have requested capacity pursuant to Section 25(b) during the quarter and the disposition of those requests.

This reporting requirement will permit the Commission to monitor compliance with the requirements of Section 25(b). It will also provide entities eligible for Section 25(b) capacity

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<sup>14/</sup> APTS and CPB assume that DBS providers will make data channels available in much the same manner as broadcast stations currently offer such services, i.e., through the use of subcarriers, the vertical blanking interval, and other portions of the television channel. However, regardless of how data channels are made available, APTS and CPB interpret Section 25(b) to give noncommercial program suppliers a right to provide data services as well as video and audio programs.

with a central source to determine what capacity is available.

The requirement should not impose undue burdens on the licensee,

as the information requested is not complex or detailed.

different channels at different hours. Rather, a reasonable and useful block must be provided so that meaningful program services can be delivered to schools, homes, businesses, and other users.

The potential uses of DBS capacity for educational and informational programming are numerous, and include not only traditional public broadcasting programming, but also in-school instructional programming, interactive distance learning and adult educational credit and non-credit courses. A number of the services now offered by or under development by the Public Broadcasting Service ("PBS") typify the services that could be made available. These include the popular PBS Adult Learning Service telecourses, which are currently delivered by satellite, PBS' proposed Ready to Learn service, which is directed towards pre-schoolers, teachers, child care providers and parents and is designed to develop school readiness, and a new Math Service, which is designed to facilitate the new national math curriculum.

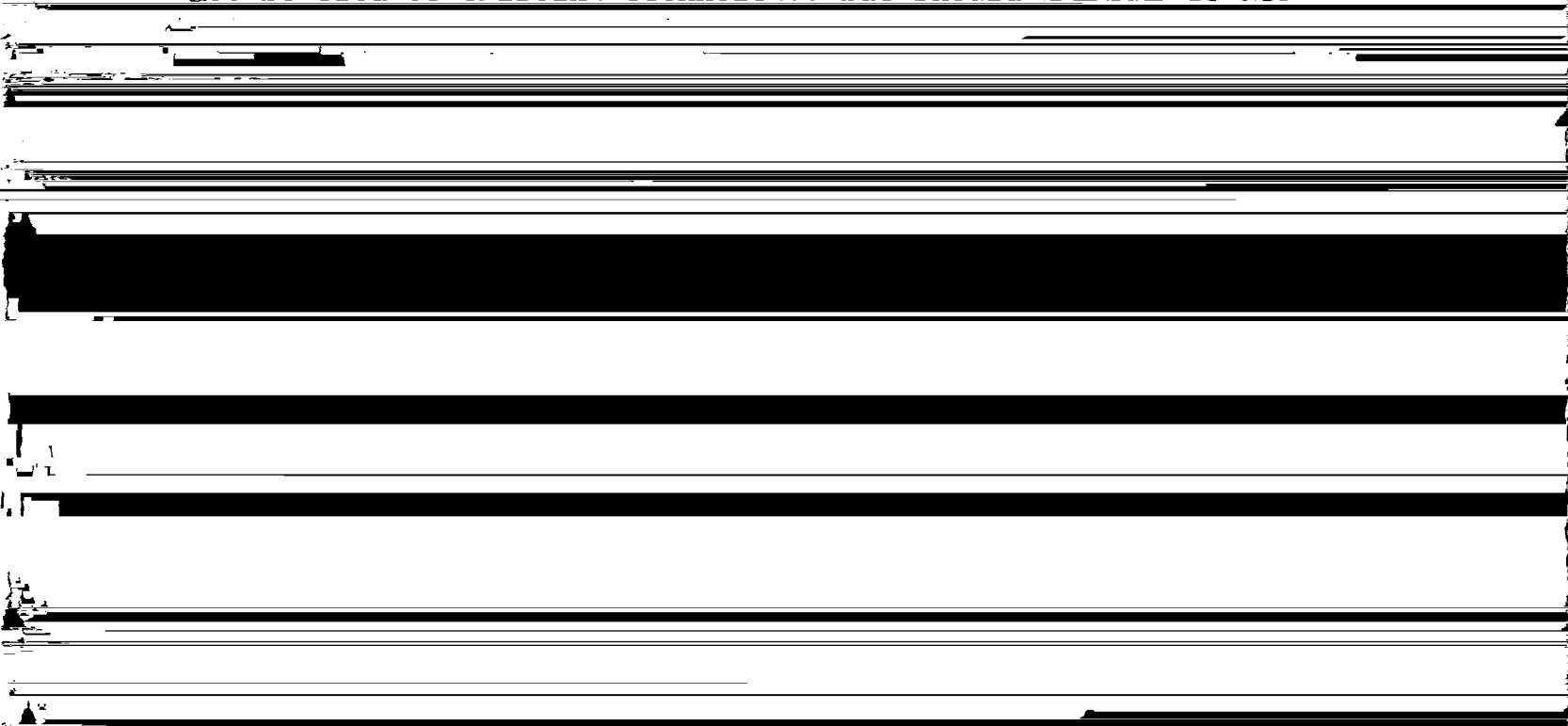
Currently, public television stations, with their single broadcast channel, do not have the ability to deliver these multiple educational services the "last mile" to homes, universities, school systems, local governments, and businesses. The DBS capacity, which Section 25(b) provides, could serve as a vital distribution mechanism to solve this "last mile" dilemma for these and other potential educational services.

Whatever the programming or other material that noncommercial entities might distribute by satellite, however, the quantity of time, the period during which it is made

available and the duration must be sufficient to permit the provision of a meaningful program service. As is the case with broadcast operations, educational entities using DBS capacity must be able to build a following and an audience in order to fulfill the objectives underlying Section 25(b).

**A. The Proposal of APTS and CPB**

The proposal set forth below is designed to achieve those objectives. APTS and CPB believe that this proposal will achieve those goals in a manner that is equitable to both the noncommercial program supplier and the satellite licensee or DBS provider. This proposal is based on four principles: first, the amount of capacity made available should be based on the total capacity of the satellite used for DBS; second, noncommercial program suppliers must utilize the satellite as it is technically configured, for example, they must utilize the compression ratios used by the DBS provider; third, the formula for determining the amount of capacity made available for noncommercial use should not be tied to existing technology, but should be sufficiently



Using those principles, APTS and CPB urge the Commission to adopt the following rule for Part 100 licensees:<sup>15/</sup>

(a) Licensees of Direct Broadcast Satellites authorized under this Part shall assure, as a condition of their license, that at least the following satellite and uplink capacity is made available for the distribution of educational or informational programming by national educational programming suppliers: (1) licensees with up to 5 transponders: 4% of the capacity of the transponders; (2) licensees with 6 transponders: 5% of the capacity of the transponders; (3) licensees with 7 transponders: 6% of the capacity of the transponders; (4) licensees with 8 or more transponders: 7% of the capacity of the transponders.

(b) The capacity of the transponders shall be calculated based on their use 24 hours per day, although the amount of time which must be made available may be rounded down to the nearest half-hour.

Note 1: For example, a satellite with 5 transponders would be required to make at least 4.5 hours available for noncommercial use. ( $5 \times 24 \times 4\% = 4.8$  hrs.)

(c) Where the capacity to be made available is less than eighteen hours per day, the capacity shall be made available between the hours of 6 a.m. and 12 midnight daily, commencing on the hour or half-hour, unless the parties agree to a different arrangement.

(d) The noncommercial program supplier shall have the right to use any subcarriers, vertical blanking interval, or other technical capabilities of transmission technology deployed, including any compression or similar techniques.

~~The noncommercial program supplier may not however demand~~

e.g., the noncommercial program supplier may not demand that the licensee make available a compression ratio not employed on the satellite.

(1) Where digital compression or a similar technology is employed which permits the simultaneous transmission of multiple programs over the same transponder, the capacity made available pursuant to this section shall be calculated based on the configuration employed on the satellite, except that more than 7% of the capacity of transponders operating at any specific compression ratio need not be made available under this section.

Note 2: For example, if a DBS satellite has 5 transponders and is employing a 4 to 1 compression ratio on all of them, at least 19 hours per day would have to be made available pursuant to this section. ( $5 \times 4 = 20 \times 24 = 480 \text{ hrs.} \times 4\% = 19.2 \text{ hrs}$ )

Note 3: If a DBS satellite has 6 transponders, 3 of which use a 3 to 1 compression ratio, 2 of which use a 10 to 1 compression ratio, and 1 uses a 2 to 1 ratio, at least 37 hours must be made available daily. (The satellite has a total capacity of 744 equivalent hours per day. ( $3 \times 3 \times 24 = 216 \text{ hrs.}$ ,  $10 \times 2 \times 24 = 480 \text{ hours}$ ,  $2 \times 1 \times 24 = 48 \text{ hrs.}$  Five percent of 744 hours equals 37.2 hrs.) However, no more than 3 hours per day need be made available at the 2 to 1 compression ratio ( $48 \text{ hrs.} \times 7\%$ ), 15 hours per day at the 3 to 1 compression ratio ( $216 \text{ hrs.} \times 7\%$ ), and 33.5 hours per day at the 10 to 1 compression ratio. ( $480 \text{ hrs.} \times 7\%$ ).

Note 4: "Equivalent hours per day" equals the number of hours of video programming available on all the transponders on the satellite times 24 hours per day. For example, if four transponders are used for DBS and the DBS provider is employing a 3 to 1 compression ratio on all the transponders, there are 288 equivalent hours per day. ( $4 \times 3 = 12 \times 24 = 288$ ).

A similar rule would apply for Part 25 satellites used for DBS, with an appropriate modification to implement the provision of Section 25(b) that DBS providers operating on Part 25

satellites have to make capacity available only if a minimum video channel capacity is devoted to DBS. Since DBS providers will probably use digital compression technology, APTS and CPB recommend that the Commission establish the minimum capacity based on the number hours of video programming available on the satellite per day, or the equivalent hours per day. APTS and CPB recommend that the minimum capacity for triggering Section 25(b) obligations should be 120 equivalent hours per day, which would entitle noncommercial program suppliers to 4.5 hours of capacity.<sup>16/</sup> The proposed rule for Part 25 licensees is attached as Appendix A.

**B. Miscellaneous Provisions Concerning Access**

**1. Educational Users Should Be Afforded a Consistent Means of Identification**

In order to insure that the public can find the educational programming offered pursuant to Section 25(b), APTS and CPB propose the capacity be made available to them on the same transponder and subchannel, as long as channels remain a relevant basis on which audiences select programming. However, if the DBS

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<sup>16/</sup> This obligation should attach when a DBS provider has the capacity to make 120 equivalent hours per day available, regardless of whether it is actually programming those hours. Operators should not be able to evade the obligations of Section 25 by not programming a few hours per day. Similarly, the Commission should aggregate the use of a Part 25 satellite system by DBS operators in determining whether 120 equivalent hours per day are offered. Licensees and those providing DBS service on Part 25 satellites should not be permitted to avoid Section 25(b) by operating multiple DBS providers, none of which offer 120 equivalent hours per day.